Supreme Court, U.S.
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No. 02-1762

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE AGUILAR ESPINOZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Mr. Jessie Aguilar Espinoza files the instant reply to address one new argument raised by the Solicitor General.

II. THE CIRCUIT SPLIT ON SPECIFIC VERSUS GENERAL INTENT HAS DIRECTLY IMPACTED MR. ESPINOZA

As explained in Mr. Espinoza's petition, the Ninth Circuit's holding in *United States v. King*, 122 F.3d 808, 811 (9th Cir. 1997) ("specific intent to threaten is required under § 876") is in direct conflict with the Fifth Circuit's decision in the instant case (holding that violation of the same statute requires only "general intent").

The Solicitor General's opposition attempts to brush aside this circuit split by claiming "petitioner's reliance on [the Ninth Circuit's decisions] is misplaced." Opp. at 9. The Solicitor General goes on to explain that if "knowingly" (as in the statute) means "with specific intent to threaten" (as interpreted by the Ninth Circuit), then inclusion of "knowingly" in the indictment satisfied the government's

burden of pleading intent. *See id.* at 9-10. This is incorrect as a matter of law and unfairly attempts to confuse the Court as to the position Mr. Espinoza was actually in.

Legally, as the Solicitor General admits, an indictment merely mirroring statutory language is sufficient only if "the statutory language itself expressly and unambiguously sets forth the elements needed to define the offense." Opp. at 6 (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Clearly, the "knowingly" language of the statute is not "unambiguous" when the Fifth and Ninth Circuit's flatly disagree on what that very word means. Thus, if "specific intent to threaten" is truly a requirement (as the Ninth Circuit has held), then Mr. Espinoza's indictment is defective.

Factually, and even more importantly here, Mr. Espinoza was convicted in Texas, under Fifth Circuit law. The Fifth Circuit interprets the statute's language – language appearing in both the statute and the indictment – as requiring

only general intent, not specific intent to threaten. So under Mr. Espinoza's Fifth Circuit indictment, specific intent to threaten was not an element pled by the government, and Mr. Espinoza had no opportunity to argue before a Texas jury that he lacked specific intent to threaten. With this argument unavailable, Mr. Espinoza had no reasonable choice but to enter the conditional guilty plea.

If Mr. Espinoza were instead charged with the same indictment under Ninth Circuit law, he could have explained to the jury that he never intended to threaten anyone (but rather was attempting to draw attention to abuses in the Texas state prison system and avoid subjecting himself to grave danger) and that the law and the indictment require the government to prove that he did have this intent. However, the Fifth Circuit's interpretation of § 876 foreclosed this possibility.

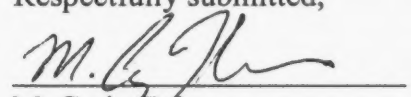
The vast difference between the procedural and substantive rights possible to Mr. Espinoza under Ninth

Circuit law compared to the lesser rights he was actually afforded under Fifth Circuit law illustrate exactly why the Court should grant certiorari to resolve this circuit split.

III. CONCLUSION

For the foregoing reason and for the reasons set forth in Mr. Espinoza's original petition, the Court should grant certiorari to correct the Fifth Circuit's error and to set forth one consistent standard for future prosecutions under § 876.

Respectfully submitted,



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